WILBERFORCE SULLY, TRUSTEE, ET AL., vs. THE AMERICAN NATIONAL BANK, ET AL.) UNITED STATES SUPREME COURT.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

BRIEF FOR APPELLANTS WILBERFORCE SULLY, in his own right as assignee of E. C. Manning, and A. B. CARHART, AND MRS. MYTON, WHO ARE GENERAL CREDITORS OF DEFENDANT CARNEGIE LAND COMPANY.

STATEMENT OF THE CASE.

I.

This writ of error is to review the decree of the Supreme Court of Tennessee pronounced in the cause of American National Bank et al. vs. Carnegie Land Company et al., sustaining the constitutionality of a Tennessee statute, passed March 19, 1877, and approved March 21, 1877, being Chapter 31 of Acts of 1877, and especially Section 5 thereof, which is in its important part, as follows:

"Sec. 5. Be it enacted that the corporations and the property of all corporations coming under the provisions of this Act, shall be liable for all the debts, liabilities, and

engagements of the said corporation, to be enforced in the manner provided by law, for the application of the property of natural persons to the payment of their debts, engagements and contracts. Nevertheless, creditors who may be residents of this State shall have a priority in the distribution of assets, or subjection of the same or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged as against all debts which may be incurred subsequent to the date of their registration or rendition."

The caption of said act is "An Act to declare the terms on which foreign corporations organized for mining and manufacturing purposes may carry on their business, and purchase, hold and convey real and personal property in this State."

The first section of the Act provides:

"That corporations chartered or organized under the laws of other States or countries, for the purpose of mining ores or coals, or of quarrying stones or minerals, or transporting the same, or erecting, purchasing or carrying on works for the manufacture of metals, or of any articles made of or from metals, timber, cotton or wool, or of building dwelling houses for their workmen and others, or gas works, or water works, or other appliances designed for the promotion of

health, good order, or general utility, in connection with such mines, manufactories and dwelling houses, may become incorporated in this State, and may carry on in this State the business authorized by their respective charters, or the articles under which they are or may be organized, and may enjoy the rights and to do the things therein specified, upon the terms and conditions, and in the manner and under the limitations herein declared."

Section 2 is as follows:

"That each and every corporation created or organized under or by virtue of any government other than that of this State, of the character named in the first section of this Act, desiring to carry on its business in the State must first file in the office of the Secretary of State, a copy of its charter or articles of association, and must cause an abstract of the same to be recorded in the office of the Register of each county in which said corporation proposes to carry on its business or to acquire any lands."

Section 3 provides:

"That such corporations shall be deemed and taken to be corporations of this State, and shall be subject to the jurisdiction of the Courts of this State, and may sue and be sued therein in the mode and manner that is, or may be, by law directed in the case of corporations created or organized under the laws of this State."

Section 4 provides that:

"Such corporations may purchase, acquire and hold real estate in fee, or any other interest less than the fee, and personal property of every kind, as they may deem necessary or suitable for the carrying on of the business specified in their

said charters or articles of association, filed as aforesaid with the Secretary of State, and may sell, lease, and convey such real estate as natural persons may do. And the State of Tennessee does hereby release its right of escheat by virtue of the alien origin of such corporations, or the alienage or non-residence of the shareholders of such corporation, or any of them."

The defendants American National Bank et al., on the 27th day of November, 1893, filed a general creditors bill against the Carnegie Land Company, a foreign corporation organized under the laws of the State of Virginia, and having complied with the Statute of Tennessee above set out, and subject to the provisions of the same, if valid.

This bill was filed in the Chancery Court of Washington County, Tennessee, alleging insolvency, failure to meet its obligations, and the fact that it had made a general assignment of all its property in Tennessee, without recognizing in said assignment the preference given to resident Tennessee creditors by said Act of 1877, chapter 31; and, also, said bill sought the appointment of a receiver and the administration of the assets of said company as an insolvent corporation

See Orig. Bill, tr. pp. 1 et seq.

See stipulations, tr. p. 143.

The bill was sustained as a general creditors bill, and administration was had of the affairs of said Carnegie Land Company thereunder.

Stipulations, id. id.

On May 28, 1895, Wilberforce Sully, trustee, and A. B. Carhart, mortgagee and holder of issue of first mortgage bonds, filed also an original bill in the same court against

said Carnegie Land Company and others to foreclose a first mortgage to secure bonds made to Sully, trustee, which had been registered February 10, 1893. This was consolidated with the general creditors bill, and the two cases were heard and tried together.

Id. id.

This mortgage was made while the Carnegie Land Company was a solvent and going concern, and covered all the property, real and personal, of the Company, and was a first mortgage and lien upon all of said property, except upon the Carnegie Hotel, the Travelers Insurance Company having first mortgage upon the hotel, and that of Sully, trustee, on its face being subject to that of the Travelers' Insurance Company as to said Hotel.

Stipulations, tr. p. 145.

Publication was made requiring all persons claiming to be creditors of said corporation, to intervene in said cause and set up their claims, and creditors did come in, and all claims were adjudicated, and no question is made in this court as to amounts allowed any creditors in the Tennessee courts.

Stipulations, tr. pp. 143-145.

The controversy in this court is between resident and non-resident creditors, and between resident and mortgage creditors, as to priorities under said Act of 1877, chapter 31, in the distribution of the assets of the Carnegie Land Company, depending upon the constitutional questions made in and decided by the Supreme Court of Tennessee.

Id., 145.

The Supreme Court of Tennessee upheld said Act and Section 5 thereof, and gave priority to Tennessee, over non-

resident, creditors and citizens, whether said non-residents were general creditors or mortgagees.

Decree of Supreme Court of Tenn. m tr. p. 87.

Plaintiffs in error are general creditors of the Carnegie Land Company, except that A. B. Carhart is a general creditor to the amount of about $3,000.00, and also a mortgage creditor for over $100,000.00, and this brief now presents the rights only of the general creditors, appellant—to be followed by separate brief for A. B. Carhart, mortgagee.

Plaintiff in error A. B. Carhart is the only general creditor who specifically and in his own behalf raised the questions now involved in the lower courts and in the Supreme Court of Tennessee, there being a stipulation of counsel to the following effect, "14th. Page 19 of the printed assignments of error of Sully, trustee, and A. B. Carhart attached to and certified between pages 2078-2079, volume 6 of the transcript, referring to the unconstitutionality of the Act of 1877, chapter 31."

Tr. p. 146.

The said assignment of error on that point, from the Court of Chancery Appeals, made in the Supreme Court of Tennessee, is as follows: "Appellant further assigns as error in the decree of the Court of Chancery Appeals that they should have held that said Act of 1877, before referred to, violates the Constitution of the United States, especially in that section of the same which provides for priority of Tennessee creditors over foreign creditors and citizens in the distribution of assets of such foreign corporation doing business in this State. The sections of the Constitution violated are section 2 of Article IV of the Constitution of the United States, and the latter part of the same,

which is as follows: 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.'

"And section 1 of Article XIV of the amendments to the Constitution of the United States, and the latter part of the same, which is as follows: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"This question has been determined adverse to the contention of appellant by this court in the case of Embreeville Land & Freehold Company, in an oral opinion, and the constitutional question in the same case is now pending before the Supreme Court of the United States, and will doubtless be decided prior to the hearing of this cause in this court. In case it is not passed on, we desire the court to pass upon this question in this cause, so that in the event the Supreme Court of the United States declares said provision of said Act unconstitutional appellant may take advantage of the same in the Supreme Court of the United States. For the reason that the question has been expressly determined by this court, we forbear to make any argument upon the same here."

Tr. p. 86.

It will be noticed that here A. B. Carhart makes the questions, decided adversely to him and all other creditors, by the Supreme Court of Tennessee, which are made here by assignment of error. This assignment was answered by the decree of that court as follows: "II. That said Act (refer-

ring to Act of 1877, chapter 31, of the General Assembly of Tennessee) or any part thereof is not in contravention or violation of the Constitution of the United States, Art. 4, Sec. 2, or of Art. 14, Sec. 1, of the amendments to said Constitution.

So that the questions here raised are clearly made by Appellant Carhart in the Supreme Court of Tennessee, and decided there.

The contention on the part of Sully and Mrs. Myton is that they and E. C. Manning, assignee, being general creditors in like class with Carhart, and all their rights to equal distribution depending on the constitutionality of the same Act, the defense was joint, and the raising of the question, and its decision by the Supreme Court, was, in a legal sense, the raising of the question by all general creditors like affected, which point will be discussed at its proper place

ASSIGNMENT OF ERRORS.

(Being the same as filed from the final decree of the Supreme Court of Tennessee, style of cause here omitted, and part of transcript filed in this court, and printed herewith according to stipulations of counsel set out and annexed to this brief.)

ALFRED B. CARHART, WILBERFORCE SULLY, AS ASSIGNEE OF THE CLAIMS OF E. C. MANNING AGAINST CARNEGIE LAND COMPANY, AND MRS. MARY P. MYTON, BY THEIR SOLICITORS, FEELING THEMSELVES AGGRIEVED BY THE FINDINGS AND DECREE OF THE SUPREME COURT OF TENNESSEE IN THE ABOVE ENTI-

TLED CAUSE. ASSIGN ERROR THERETO AS FOLLOWS:

I.

That the said court erred in finding that the Act passed by the General Assembly of Tennessee on March 19, 1877, and approved March 21, 1877, being chapter 31 of the Acts of 1877, of General Assembly of Tennessee, and especially section 5 thereof, was not in violation of section 2 Article IV of the Constitution of the United States, which provides that "The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States;" and, said court erred in giving preference and priority under said Act, the same being invalid for foregoing reasons, to residents and citizens of Tennessee over appellants, who were residents and citizens of States other than Tennessee, in the distribution of the assets of defendant corporation, on its becoming insolvent.

II.

Said court erred in holding that said act, and especially said section 5 of the same, was not a violation of section 1, Article XIV of the Amendments to the Constitution of the United States, which provides that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." The act, in this cause, by the enforcement of the same by said court as against appellants, and the barring of appellants themselves from participation in the distribution of the assets of defend-

ant company, until after full satisfaction of debts of residents and citizens of Tennessee, in its operation abridged the privileges and immunities of appellants as citizens and residents of the United States.

III.

That said court erred in not enforcing the rights of appellants to share in the like form and manner in the distribution of the assets of the defendant company with residents and citizens of the State of Tennessee; that, appellant A. B. Carhart, of the class and representation of all other general creditors, citizens and non-residents of Tennessee, and residents and citizens of the United States, raised the question herein made as to the violation by said act of 1877 enforced against appellants in the above cause by the Supreme Court of Tennessee, of section 2 Article IV of the Constitution of the United States, as set out before and in the Supreme Court of Tennessee, the highest court in the State of Tennessee in which a decision in this suit could be had, and claimed the rights, privileges and immunities guaranteed to appellants under said provision of the United States Constitution, and the decision of said Supreme Court of Tennessee was against the rights, privileges and immunities so claimed by appellants under said provisions of the Constitution of the United States.

All of which is here assigned as error.

BRIEF AND ARGUMENT.

The first assignment of error raises the question which we think conclusive of the controversy, so far as it lies between Tennessee creditors and creditors who are residents and citizens of other States.

If plaintiffs in error and E. C. Manning, from this record, are residents and citizens of State other than Tennessee, to-wit: of the State of New York; and if appellants have raised and had decided in the Supreme Court of Tennessee the federal question now presented, within the meaning of the law, then this case falls directly within the case of Blake vs. McClung, 172 U. S., 239, which holds the very identical act and section thereof now complained of, a violation of section 2 Article IV of the Constitution of the United States.

1. Our first insistence is that plaintiffs in error are citizens of a State other than Tennessee.

It is agreed in the stipulations of counsel that neither Wilberforce Sully, trustee, A. B. Carhart, Mary P. Myton, nor E. C. Manning, whose assignee Wilberforce Sully is, proved, or attempted by evidence to show in what jurisdictions they were citizens respectively.

Stipulations, tr. 147.

Neither did Blake or Rogers, in the Blake-McClung case before referred to, prove or attempt "by evidence to show in what jurisdictions they were citizens respectively," on that point this court saying, "The suggestion is made that as the statute refers only to residents, there is no occasion to consider whether it is repugnant to the provision of the National Constitution relating to citizens. We cannot accede to this view. The record shows that the litigation proceeded throughout on the theory that plaintiffs in error, Blake and the persons composing the firm of Rogers, Blake & Co., were citizens of Ohio, in which State they resided, transacted business and had their offices," etc. "The intervening petition of the plaintiffs in error, states that they were residents of Ohio, engaged in business in that State, their

residences, offices, and places of business being at the city of Cincinnati, and that they were citizens of the United States, and not citizens of Tennessee, although these allegations might not be sufficient to show that those parties were citizens of Ohio within the meaning of the Statute regulating the jurisdiction of the Circuit Courts of the United States (Robertson vs. Cease, 97 U. S., 646), they may be accepted as sufficient for that purpose in the present case, no question having been made in the State Court that the individual plantiffs in error were not citizens, but residents of Ohio."

So also in the case at bar it is admitted that the residences of the plaintiffs in error were in the State of New York, and "non-residents within the meaning of the Act in question," and all residents of Tennessee are set out.

Stipulations, tr. 144-147.

That the place of business of Sully and Carhart was New York City, appears inferentially in the original bill filed by them.

Tr. pp. 15-23.

In addition to this statement and the stipulation, it further is manifest that plaintiffs in error as well as all other parties, recognized that plaintiffs in error were citizens of a State other than Tennessee, and never questioned the fact, which the court can see was susceptible from this record, of the easiest affirmative proof, if unadmitted. The question of the violation of Article IV, Section 2, by the act in question, was made at an early stage of the cause by Sully and Carhart, was passed on in the Courts of Chancery Appeals and in the Supreme Court on the ground of the violation of

the rights of said Sully and Carhart as citizens of another State, by the enforcement of said act.

Assignments of Sully and Carhart, tr. p. 86.
Assignments of error in Court of Chancery Appeals, tr. p. 124.

No party to this record there denied, in answer to assignments of error, or otherwise, in argument, that the parties assigning were not citizens of another State and not entitled to raise the question. This is affirmatively shown by the decree of the Supreme Court of Tennessee, which meets the question fairly as one properly raised by a citizen of another State and decided on that, the only theory presented or relied on before them. In the assignments of error in the Supreme Court of Tennessee by Sully and Carhart, it is objected by them that said act of 1877, chapter 31, "which provides for priority of Tennessee creditors over foreign creditors and citizens in the distribution of assets of such foreign corporations doing business in this State, violates Section 2, Article IV (setting it out), and also Section 1, Article XIV of the amendments," etc., which was not answered by the Court's saying that the question was not raised by a proper party, i. e., a citizen of another State, but on the contrary treated the question as it has been treated all through the litigation, as one involving the rights of citizens of other states and decided it on its merits.

The general creditors bill in the cause below was filed by the American National Bank et al., who, by permission of the court, intervened in the Sully and Carhart bond case in behalf of themselves, as Tennessee creditors, and in behalf of all other bona fide creditors of the Carnagie Land Company.

These people acting for all others in their answer at the threshhold say, "Respondents will here show that even if said mortgage were valid, and said $85,000.00 of bonds were in fact issued, the debts sued on by the American National Bank and Shields Bros., were contracted by the Carnegie Land Company and owing long before the execution and registration of said mortgage, and that therefore these debts owing to citizens and residents of Tennessee prior to the execution and registration of said mortgage would have priority under the law over any debt secured or intended to be secured by said mortgage."

Answer of Am. Nat. Bank et al., tr. p. 30.

This answer was filed August 2, 1895, and then and thereafter, in this record, the words residents and citizens were used as meaning citizens under this statute. The parties and the court so treated it and we insist that it is now too late in this court to depart from it in order to side-track a plain constitutional right. Another and conclusive answer to such contention, if made, that plaintiffs in error are not citizens of another State than Tennessee, grows out of the plain language of the stipulations of counsel, i. e., "within the meaning of said act," and that their residence is in the State of New York.

Stipulations, tr. p. 144.

Now, what is a "non-resident creditor within the meaning of said act?" This was settled and well known to counsel, because the leading counsel of creditors opposing plaintiffs in error were of counsel in the case of Blake vs. McClung, wherein the court said, "Looking at the purpose and scope of the Tennessee statute, it is plain that the words 'residents of this State' refer to those whose residence in

Tennessee was such as indicated, that their permanent home or habitation was there, without any present intention of removing therefrom, and having the intention when absent from the State to return thereto; such residence as appertained to or inhered in citizenship. And the words in the same statute, 'residents of any other country or countries' refer to those whose respective habitations were not in Tennessee, but who were citizens, not simply residents of some other State or country."

172 U. S., 247.

Now, if appellants were "non-residents within the meaning of the act" which meaning and construction had been given by this court, before this case, then plaintiffs in error being "non-residents within the meaning of the act" are admitted to be citizens of New York.

2. If appellant Carhart, as general creditor, is then a citizen of New York, as seems clear, and raised and had decided the federal question here involved, as is manifest, then his right to a reversal of the decree is undisputed; but it will be insisted that plaintiffs in error, Wilberforce Sully, as assignee of E. C. Manning, and Mrs. Myton, did not appear in the Supreme Court of Tennessee, and did not raise and have decided the federal question here made. As against this contention, we have two answers as to Wilberforce Sully as assignee: 1. That Wilberforce Sully, trustee, was in the Supreme Court; that he raised this question and had a decision, and having done so in one right, it does not change the person of the exceptant, and that within the meaning of the law Wilberforce Sully raised the federal question, was in court, and can maintain this writ of error. 2. That the status of Wilberforce Sully and also Mrs. Myton was that of A. B. Carhart, and that if the Supreme Court of Tennessee

had, on the appeal and writ of error of A. B. Carhart and Sully, trustee, declared the act of 1877, chapter 31, and section 5, unconstitutional, the decree would have been pronounced, under the practice of that court, not only in behalf of Carhart and Sully, trustee, but in behalf of all other creditors in like situation, whether before the court by appeal or not, and that in remanding the cause for distribution of the funds, all citizens of the United States not citizens of Tennessee would have shared the fruits of Carhart and Sully's action, and that therefore, within the meaning of the law, these other creditors were raising the federal question now made, through the person of their representative, by way of joint defense, and on an adverse decision, have the individual right to abide by that decision, or to now prosecute a write of error to this court.

So far as we are able to discover, this question has not been before this court in this form, and the decision as to the necessity of the raising of the federal question by plaintiffs in error, in the highest court of the State, have been only in cases where the plaintiff in error did or did not sufficiently, properly, or opportunely raise the question himself, and the question here presented did not arise.

4 Wall., 177-180;
11 Wall., 36-39;
92 U. S., 327;
125 U. S., 54;
137 U. S., 300;
150 U. S., 433;
163 U. S., 63;
154 U. S., 114.

It seems to have been settled inferentially by this court, that if according to the practice of the particular State, the

point is raised, and in such way as to necessarily call for a decision upon the point, and such a decision as would necessarily, according to practice of the State, inure to the benefit of other parties like or jointly interested, if favorable, then that the point is raised by such party, within the meaning of the federal law upon the subject, and writ of error by such party whose rights are thus determined, may be prosecuted to this court. As was said by this court in the case of Morrison vs. Watson, 154 U. S., 115: "In order to give this court jurisdiction of a writ of error, to review a judgment of the highest court of a State, on the ground that it decided against a title, right, privilege or immunity claimed under the Constitution or a treaty or statute of the United States, such title, right, privilege or immunity, must have been specially set up or claimed at the proper time and in the proper way. If it were not claimed in the trial court, and therefore, by the law and practice of the State, as declared by its highest court, could not be considered by that court; or if it was not claimed in any form before judgment in the highest court of the State, it cannot be asserted in this court."

Thus it is held that even though the question be raised in the highest court of the State, yet if the practice of that court precludes the consideration of the question by such court, on account of the same not being raised in the trial court, a writ of error cannot be maintained. So, on the contrary, it would follow, it seems, that if according to the practice of the court in question, the question was raised specially, and called for a determination of rights directly affecting plaintiffs in error, Sully and Myton, and which, if decided favorably, would have been held by that court to include plaintiffs in error, and decided adversely was held to exclude them, then writ of error could be prosecuted and

maintained. As stated in such case by Mr. Guthrie, "The question thus often becomes one of the practice in the particular State."

Guthrie on Fourteenth Amendment, p. 156.

Then, under the practice in Tennessee, would the decision of the question now raised by plaintiffs in error in this court, and raised by them through A. B. Carhart in the Supreme Court of Tennessee, if decided favorably to Carhart by said court, have been in favor also of Sully, as assignee, and Mrs. Myton, and have been so declared by said court under its holdings?

It is the uniform holding in Tennessee that "A broad appeal by any one party from an entire Chancery Decree, where the matter is purely of equitable cognizance, carries up the whole case, so as to allow relief to be granted to those who do not appeal."

Note 4 to Sec. 4891 Shannon's Code of Tennessee, citing 2 Tenn. Chy., 574; 2 Heisk., 441-561; 3 Heisk., 598; 5 Heisk., 244.

The above cases support the text, and the case in 2 Heisk., 561, was one where only three defendants appealed, and yet relief was granted to all the defendants in the Supreme Court. So also was the holding in the case in 3 Heisk., 598.

The Travelers Insurance Company, and it seems, also, American National Bank, prayed broad appeals from the decrees of the Chancellor and Court of Chancery Appeals.

Tr. pp. 52 and 85.

"If a decree is severable or adjudges independent rights, it will remain in force as to those parties who do not appeal, and be vacated as to those who do appeal. On the other hand, where the proper decree will necessarily affect the parties who have not appealed, the Supreme Court, al-

though the appeal be taken by only one party, will determine the whole cause as it stood before any decree was rendered."

Note 6 to Sec. 4891, Shannon's Code of Tennessee, citing 3 Lea, 352.

The very language of Mr. Shannon applying to equity causes, is taken from the case in 3 Lea, 352, and approved in all subsequent cases, and it does not affect the question as to who appeals; and a broad appeal is not necessary, provided the appeal or writ of error calls for a decision upon the very question affecting the rights of the other parties.

See 3 Lea, 352; 11 Heisk., 299.

The same principle was announced by the same court as late as 6 Pickle, 32 and 383.

In the latter case, one heir only excepted to a Master's Report as to debts. The court said, "The decree was one confirming the settlement between the executors and the estate of Lewis Shanks, and confirming a Report of the indebtedness of the same to other creditors. A defense interposed to such Report goes necessarily to the whole decree, and results to the benefit of all, even though the others had failed originally to except, and were therefore in no situation to interpose defenses in an error proceeding. A defense interposed by one heir or devisee in an account such as this was, inures to the benefit of the estate, and its effect cannot be limited to the one so excepting."

We think these cases are conclusive as to the practice in Tennessee, and if a person not excepting to report of Master, which is confirmed, can by appeal from the decree have the benefit of an exception by another appellant, as decided in last case cited, then we think it clear that a writ of error can be likewise prosecuted to this court to maintain and

have made effective a defense, which if sustained in the Supreme Court of the State, would have necessarily, according to the practice of that State, inured to the benefit of plaintiffs in error, and that, for this reason, the right now set up was "specially set up and claimed" in the highest court of the State, according to the practice of said State. If this is so, then all the appellants, general creditors, citizens of New York, are entitled to a reversal of the decree of the Supreme Court of Tennessee under the case of Blake vs. McClung, 172 U. S., 237.

If the assignments of error are well taken, and even if the mortgage of A. B. Carhart is valid, and Section 5 of the Act of 1877, chapter 31, violates only Section 2, Article IV of the Constitution, and for that reason the Travelers Insurance Company, a foreign corporation, is entitled to no relief, it not being a citizen within the meaning of Section 2, Article IV, and if, for any reason, A. B. Carhart, under his second mortgage, has no priority in the distribution of the proceeds of the sale of the hotel property covered by Travelers Insurance Company's mortgage, then plaintiffs in error insist they are entitled equally with Tennessee creditors to share in the distribution of proceeds of said hotel property.

Shields Bros., one of the Tennessee creditors in the original bill below has conceded the contention of plaintiffs in error, since the decision of Blake vs. McClung, supra., and now makes such concession.

R. E. L. MOUNTCASTLE,
For Plaintiffs in Error.

QUINCY WARD BOESE,
SHIELDS & MOUNTCASTLE,
Of Counsel.

WILBERFORCE SULLY, TRUSTEE, ET AL., vs. AMERICAN NATIONAL BANK ET AL. | UNITED STATES SUPREME COURT. October Term, 1899.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

BRIEF OF A. B. CARHART, MORTGAGEE, AND WILBERFORCE SULLY, TRUSTEE, SETTING UP THEIR RIGHTS UNDER THEIR MORTGAGE MADE BY DEFENDANT CARNEGIE LAND COMPANY.

THE RIGHTS OF THE GENERAL CREDITORS PLAINTIFFS IN ERROR. ARE, OF COURSE, SUBORDINATED TO THE RIGHTS OF PLAINTIFF IN ERROR CARHART, MORTGAGEE, AS TO THE PROCEEDS OF THE PROPERTY COVERED BY THE LATTER'S MORTGAGE, IN THE EVENT THIS COURT IS OF OPINION THAT THE ACT OF 1877, CHAPTER 31, SECTION 5, IS INSUFFICIENT TO DIVEST THE LIEN OF THE SAME.

I.

STATEMENT OF THE CASE.

We here adopt the statement of the case made in the brief of plaintiffs in error, Sully, Carhart, and Mrs. Myton.

II.

ASSIGNMENT OF ERRORS.

(Being the same filed in the Supreme Court of Tennessee from the decree of said court, omitting style of cause, and transcribed in the record to this court, at pages indicated in stipulations, printed at the close of this brief.)

WILBERFORCE SULLY, TRUSTEE, AND ALFRED B. CARHART, RESIDENTS AND CITIZENS OF THE STATE OF NEW YORK, BY THEIR SOLICITORS, FEELING THEMSELVES AGGRIEVED BY THE FINDINGS AND DECREE OF THE SUPREME COURT OF TENNESSEE IN THE ABOVE ENTITLED CAUSE, ASSIGN ERRORS THERETO AS FOLLOWS:

I.

That the said court erred in finding and holding that the Act passed by the General Assembly of Tennessee on March 19, 1877, and approved on March 21, 1877, being chapter 31 of the laws of Tennessee of 1877, defining the terms upon which foreign corporations organized for mining and manufacturing purposes might do business in Tennessee, and especially section 5 thereof, was not in violation of section 2, of Article IV, of the Constitution of the United States which provides that, "The citizens of each state shall be entitled to all privileges and immunities of the citizens of the several States;" and said court erred in holding thereunder that Tennessee creditors were preferred by virtue of said void act, over appellants, as citizens and residents of other States, in the distribution of the assets of defendant Company; that, said court should have held that as appellants were residents and citizens of the State of New York, and as the act in question gave an unauthorized preference, privilege and im-

munity to residents and citizens of Tennessee, by virtue alone of said residence and citizenship, the act and section thereof was unconstitutional and in violation of said clause of the Constitution of the United States, as against appellants, in this:

a. Because, outside of their mortgage, appellants being the holders of the first registered mortgage upon most of the property of defendant company, and being the holder of the second mortgage to the Travelers Insurance Company, another appellant, upon the remainder of the property of the defendant company, appellants were at least entitled to share in all the assets of the defendants Carnegie Land Company, equally with residents and citizens of Tennessee.

b. By virtue of the mortgage above indicated held and declared by said court in favor of appellants, they, as citizens and residents of the State of New York, were entitled to the full security of their said mortgage upon all the property of the defendant company, both that covered by the first mortgage of appellants, and that covered by the second mortgage of appellants, as against all parties, Tennessee creditors, and all other citizens or corporations of other States, appellants taking the proceeds of the property upon which they hold the second mortgage, in the event the first mortgage, Travelers Insurance Company, for any reason, is not able to hold, by virtue of being a foreign corporation, and not a citizen within the meaning of the Constitution of the United States; the said Supreme Court of Tennessee should have thus held with respect to the rights of appellants under the mortgage, for the reason that said Act of 1877 and section 5 thereof does not impose upon the mortgagees, citizens, or residents of Tennessee any such postponement of their rights, as is sought to be imposed upon

mortgagees, residents, and citizens of other States than Tennessee, to-wit: the postponement of such non-resident mortgagees to the debts, contracts, and engagements of Tennessee resident creditors contracted prior to the making and registration of such valid mortgages, said act especially placing a burden upon and withholding a benefit from the non-resident mortgagee, that is not placed and withheld respectively in so far as Tennessee mortgagees are concerned; that if said act and section is valid as to the Travelers Insurance Company holding first mortgage upon part of the property, on account of the fact that the latter is not a citizen of another State than Tennessee, within the meaning of Section 2, Article IV of the Constitution, it nevertheless is true that said act is invalid as to appellants with reference to their lien upon not only the property upon which they hold their first mortgage, but also upon the particular property covered by the mortgage of the Travelers Insurance Company, as against all simple contract creditors—resident or non-resident creditors; and this the said court should have held, and their refusal to do so was manifest error.

2.

That in the Chancery Court held at Johnson City, in Washington County, Tennessee, being the court which had and exercised the original jurisdiction in the above entitled cause, the appellants herein specifically set up and claimed that they were entitled to the privileges and immunities guaranteed in Section 2, Article IV of the Constitution of the United States, viz.: "The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States;" and that they were deprived of such privileges and immunities by the Act of Tennessee approved March 21, 1877, above referred to; and, also, that

their rights, privileges, and immunities, as citizens of the United States, were abridged by the provisions of the statutes of the General Assembly of Tennessee, approved March 21, 1877, above referred to, under the provisions of Section 1 of Article XIV of the Amendments of the Constitution of the United States, and that they were also deprived of their property and rights without due process of law by the enforcement of said invalid Act of said General Assembly of Tennessee but the decision of said Chancery Court was against said rights, privileges, and immunities so claimed by appellants; and, the same rights, privileges and immunities so set up and claimed by appellants in said Chancery Court were again set up and claimed by said appellants in the Supreme Court of Tennessee, the highest court in the State of Tennessee in which a suit of this kind could be had, and the decision of said Supreme Court was against appellants.

All of which is here assigned as error.

3.

That the said Supreme Court of Tennessee erred in finding and holding that the said Act of the General Assembly of Tennessee, passed March 19, 1877, and approved March 21, 1877, and being chapter 31 of the Acts of 1877, and especially Section 5 thereof, which was enforced against appellants in the above entitled cause was not in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" but

said court should have held that said Act, and especially Section 5 thereof, did abridge the rights and privileges of appellants as citizens of the United States, and did deprive appellants, as mortgagees, of their property and rights, without due process of law, and deprived them of the equal protection of the laws, in this:

a. That said mortgage was made by a solvent and going corporation, to-wit, the defendant Carnegie Land Company, authorized to make the same under the laws of Tennessee, and having the constitutional right as a solvent and going concern, to contract as any other person or corporation within the State of Tennessee, which constitutional right of the parties to said contract, to have the same enforced substantially as provided by the terms thereof, could not be taken away by statute, on the happening of a future event or winding up of the mortgagor, Carnegie Land Company —such arbitrary statute destroying, in this case, by its application, the ability and right of such a going concern to use and handle its property and contract with respect thereto, as permitted to all other solvent holders and owners of such property within said State;

b. That court should have held that said Act, and Section 5 thereof, which was enforced against appellants, and through which Tennessee creditors were given priority over appellants in the distribution of the assets of the defendant Company, though first mortgages, was in violation of said Section 1 of Article XIV of the Constitution of the United States, and was not "due process of the law," because said Act and section was class legislation within the meaning of the law, in that the selection of the class subject to its provisions, to-wit: Foreign corporations permitted to do business as Tennessee corporations, in all respects, and whose

engagements were by said Act to be enforced in the same manner as provided by law for natural persons, was not a natural but an arbitrary selection of class, without any reason, public or private, pointed out or to be otherwise seen, why this particular mining and manufacturing corporation, more than any natural person or other domestic corporation, or other foreign corporation not organized for the purpose of manufacturing or mining, as embraced in the Act, should be deprived of the Constitutional right of other solvent and going concerns, or persons, to own, use and contract with respect to their property within the State, as allowed to all other property owners, and why the creditors of such corporation should be required to take a mortgage subject to the priority in favor of unknown debts and debtors theretofore contracted, in the event of subsequent insolvency, when mortgagees of no natural person, domestic corporation, or other foreign corporation, except manufacturing and mining, are required to be so postponed and deprived of their ordinarily legally acquired rights. In enforcing the Act against appellants, and not holding the same void, for the above reasons, and depriving thereby appellants of their property and rights, said court erred.

Wherefore, these appellants pray that this cause may be re-examined by the Supreme Court of the United States for writ of error for and on the errors assigned, and said findings and decree of the said Supreme Court of Tennessee may be reversed.

III.

BRIEF AND ARGUMENT.

I.

It is unnecessary to again take up the argument as to the citizenship of Sully, trustee, and Carhart, mortgagee, and we refer to the argument advanced in the brief of plaintiffs

in error, Sully, Carhart, and Myton, upon the question of citizenship, but the question we desire to first discuss, arises under the first assignment of errors, and presents for the consideration of this court the question, whether Section 5 of Chapter 31, Act of 1877, before set out, grants to Tennessee citizens, who are mortgagees and judgment creditors any privilege or immunity over judgment creditors or mortgagees who may be residents and citizens of a State other than Tennessee.

This part of the Act and of Section 5, to be construed, is the following: "Nevertheless creditors who may be residents of this State, shall have a priority in the distribution of assets, or subjection of the same or any part thereof to the payment of debts, over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts, which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid and shall constitute a prior lien on the property on which they are or may be charged, as against all debts which may be incurred subsequent to the date of their registration or rendition."

It will doubtless be insisted by defendants in error that there is no burden placed upon non-resident citizens, mortgagees and judgment creditors, that is not placed upon resident mortgagees and judgment creditors. In other words, that Tennessee creditors who have no mortgage and no judgment, have priority over mortgagees and judgment creditors, if the debts of the former were contracted before the registration of the mortgage or the rendition of the

judgment, regardless of the residence or citizenship of the mortgagees or judgment creditors.

Stated differently, the proposition is, that a Tennessee creditor who has no judgment and no mortgage, shares with all other Tennessee creditors until the former takes judgment or mortgage, and by that act, he loses his right to share with Tennessee creditors, and instead of getting a benefit by his diligence, in case of subsequent insolvency, he not only loses the lien of his judgment or mortgage as to all debts contracted to Tennessee creditors before the registration or rendition, but in addition loses even that right that he formerly had as a general creditor. This looks remarkable on its face, and such construction must be imperative to justify the idea that the Legislature intended so unheard of, absurd, and unjust a proceeding. What possible reason can any one give for such an act, in the light of such construction? Is there anything in the remainder of the Act which leads to the conclusion that the Legislature intended here to say that a Tennessee creditor took a judgment, the ordinary process of law, against a foreign corporation owing him, only on the penalty of thereby taking, in the event of subsequent insolvency, subject to all Tennessee creditors, whose debts were contracted before his judgment was taken, although the other Tennessee debts may have been contracted years after the debt of the judgment creditor was contracted?

The whole act shows an intention to protect Tennessee creditors over foreign creditors, but no part of it shows any intention on the part of the Legislature to burden or punish one Tennessee creditor for the benefit of another. What public policy would justify such an unheard of proceeding, or what reason would support it? Why would the exercise

of ordinary process of law, allowed to all creditors for the collection of debt, visit upon the citizen of Tennessee, not the ordinary result, but the highest penalty, and a penalty which is higher than that visited upon the creditor who takes a judgment against a debtor corporation, already insolvent, no longer a going concern, and levies execution upon such corporation's goods, which penalty requires the creditor to lose only his apparent advantage, but yet permits him to share equally with all the other creditors.

No such proceeding is found anywhere else in Tennessee legislation, and it would prevent ordinary equality among Tennessee creditors, which is a cherished subject of such legislation, as evidenced by the general assignment law, and the law intended to prevent preferences by insolvent debtors

Act of 1881, chap. 121;

Act of 1895, chap. 128.

The latter act was so drastic in its efforts to enforce equality of distribution of the assets of all debtors, that the Supreme Court of Tennessee was forced to declare it unconstitutional, as violating the right of every solvent debtor to use and dispose of his property as he saw fit.

13 Pickle, 604.

In view of these stringent statutes to enforce equality among creditors, it would be strange if the Legislature, as is contended for on the other side, should swing completely to the other side without any reason, and say that a Tennessee judgment or mortgage creditor of a solvent concern, although universally in Tennessee, outside of this statute, in case of a judgment of a court of record, and of a mortgage registered, entitled to a recognized priority, is not even entitled to equality with other Tennessee creditors, if his

debtor happened to be a foreign corporation, doing business under the Act of 1877, chapter 31. What reason can be given for this arbitrary selection for punishment of Tennessee judgment creditors of a corporation, instead of likewise extending the punishment to such a creditor of an individual? Why not also to the judgment creditor of a domestic corporation? Why single out the Tennessee judgment creditor of only a foreign corporation organized for the purpose of manufacturing or mining?

If the construction of the language under review insisted on by defendants in error is correct, then the act violates the Tennessee constitution, and such a construction will be repelled by this court, if our view of it is correct, unless this court can find no other.

It is said by the Supreme Court of Tennessee in the case of Morris claimants vs. Stratton claimants, speaking through Ed Baxter, Special Judge, quoting the syllabus, "'Law of the Land,' correctly defined, means a law 'which embraces all persons who are or may come into like situation and circumstances.' It may be made to extend to all citizens, or be confined under proper limitations to particular classes. If the class be a proper one, it matters not how few the persons who may be included in it," and further, "Whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of this classification must be natural and not arbitrary. If the classification is made under Article XI, Section 8 of the Constitution for the purpose of conferring upon a class the benefit of some special right, privilege, immunity or exemption, there must be some good and valid reason why that particular class should alone be the recipient of the benefit.

If the classification is made under Article 1, Section 8 of the Constitution for the purpose of subjecting a class to the burden of some special disability, duty, or obligation, there must be some good and valid reason why that particular class should alone be subject to the burden."

5 Pickle, pp. 499-500.

Is there any "good and valid reason" why a Tennessee creditor of this particular kind of corporation, even if first debt created by such corporation, to promote its earliest enterprise and bring it into active being, should lose all rights of equality with other Tennessee creditors, by taking judgment or mortgage? If there should be conjured up some sort of reason, why would such reason not apply to such Tennessee creditor of other foreign corporation, domestic corporation, or even private person?

As the construction contended for by defendants in error would thus necessarily make the Act a violation of the Tennessee Constitution, as we insist, and as the construction we insist on is the one more natural and reasonable, and in consonance with the Tennessee Constitution, and the legislative purpose and policy, otherwise expressed, this court will give it the construction that the Legislature intended, i. e., to burden foreign citizens and residents who were mortgage or judgment creditors, with the priority of Tennessee creditors, contracted before, in the event of subsequent insolvency, and especially as all the Courts of Tennessee in the case at bar have practically and in effect so construed the Act, by decreeing that Tennessee judgment creditors should share equally and on the same basis as simple contract Tennessee creditors, when, if contention of defendants in error, now insisted on, had been insisted on by them in the State Courts,

and had been agreed to by the latter, Tennessee judgment creditors should have been postponed in favor of the debts of other Tennessee creditors contracted before the rendition of such judgments. Every Tennessee judgment creditor, on judgment rendered against Carnegie Land Company, was permitted to share equally with other Tennessee creditors.

H. C. Jarvis obtained a decree against Carnegie Land Company, Sept. 15, 1895, on debt contracted in 1890, and was allowed to share on a basis of equality with other Tennessee creditors, in the decrees of the Tennessee courts, notwithstanding the rendition of the decree.

Tr. Decree of Court of Chancery Appeals, p. 81.

It is one of the Tennessee creditors.

Stipulations, p. 143.

See also adjudications of Chancellor as to Tennessee creditors as a class, confirming Report of Master, tr. pp. 39-45-49.

Decree in above cause was rendered after general assignment of Carnegie Land Company.

In case of Frame King, a non-resident creditor was allowed to share as a Tennessee creditor, by virtue of right of Preas, a Tennessee creditor, who made payments as surety to King for his principal, the Land Company.

Decree of Supreme Court, p. 88.

This was by virtue of a decree rendered in favor of King, June 8, 1893, five days after the general assignment of defendant Land Company, June 3, 1893.

Decree of Court of Chancery Appeals, p. 82.

Maiden and wife, Sully assignee, was permitted to share with other Tennessee creditors.

Decree of Court of Chancery Appeals, p. 78.

This decree was rendered June 7, 1893, four days after the assignment, June 3, 1893. All these decrees were rendered before the general creditors bill of defendants in error was filed, Nov. 27, 1893, and before said bill was sustained for the distribution of the assets.

For the above reasons, we insist that the Act in question properly construed by this court, grants an immunity to Tennessee judgment and mortgage creditors, and imposes upon non-resident judgment and mortgage creditors, citizens of other States, the burden of submitting to a priority in favor of Tennessee creditors, whose debts were contracted before said mortgages were registered or judgments rendered.

This makes out a case clearly within the second section of Article IV of the Constitution of the United States, and mortgagees, citizens of other States, are entitled to priority, by virtue of their mortgages, to the same extent as would Tennessee mortgagees, the said mortgage of plaintiff in error having been made by a soivent concern, as agreed in the stipulations of counsel, and the Act in controversy having sought to deny this privilege to citizens not of this State, which is granted to residents of Tennessee, the said Act is void, and plaintiff in error should be decreed to be paid his debt, first out of the proceeds of the sale of the property covered by his mortgage, without abatement, except for the commission to be paid to the Clerk and Master for making sale of the property mortgaged.

This Act out of the way, plaintiff would take, under the

law of Tennessee, as above indicated, and under this Act, a mortgagee would likewise so take, and the measure of the Tennessee mortgagee's right is the measure of the right in all respects of plaintiffs in error. For status of Tennessee mortgagee

See 95 Tenn., 142-144.
91 Tenn., 12.
95 Tenn., 696.

If, for any reason, the mortgage of plaintiff would not hold the first lien, the mortgage debt, under the decision of Blake vs. McClung, supra, should share equally with Tennessee creditors, as stated in first assignment of error.

We furthermore insist, that, although the mortgage of Appellant Carhart is only the second mortgage on the particular piece of property, covered by the mortgage of the Travelers Insurance Company, to-wit: the Carnegie Hotel, yet the Travelers Insurance Company is not a citizen of the United States, within the meaning of the section of Article IV of the Constitution of the United States, and for that reason the Act in question is valid as to it.

Blake vs. McClung, supra.

This being the case, as a Tennessee mortgagee would by virtue of a second mortgage have priority in the distribution of the proceeds of sale of said Hotel property, so also plaintiff in error is entitled to like priority.

II.

We next insist that Section 5 of the said Act in controversy also violates Section 1 of the XIV Amendment to the Constitution of the United States, in this, that said Act seeks to deprive plaintiff in error of his property without due process of law.

The validity of said mortgage, and that it was made by a going concern, is admitted in the stipulations of counsel.

Tr., 145.

It has been said by this court, in the case of Blake vs. McClung, supra, "It does not follow that within the meaning of that Amendment" (meaning the XIV Amendment) "the judgment below deprived the Virginia corporation of property without due process of law, simply because its claim was subordinated to the claims of the Tennessee creditors. That corporation was not, in any legal sense, deprived of its claim, nor was its right to reach the assets of the British corporation in other States or countries disputed."

172 U. S., 262.

It will be recalled that the claim of the Virginia corporation was only a claim of a general creditor, and no right of a mortgagee was involved in any wise in that case.

Can it be said that if a corporation has the right by law to contract a mortgage, fixing a lien upon property, and by law is deprived, in fact, as in this case, of that lien and debt, in favor of general creditors, of whom no notice is given to the mortgagee, by registration or otherwise, in consequence of an act happening after the making of the valid contract, through no act of the mortgagee, such a law is not depriving that mortgagee of his property, the lien of his note, which alone perhaps gives it important value?

If such an act produces the effect indicated, does it not, in fact, deprive the mortgagor and mortgagee of their liberty of contract, and of alienation of property, without due process of law?

These questions were specially set up and claimed in the

Supreme Court of Tennessee by plaintiff in error, and decided adversely to him.

Assignment of error of plaintiff in error, tr. 106; Decree of Supreme Court, tr. 87.

In addition to the foregoing points of objection, we insist that the said Act is not due process of law, because it is class legislation, and the selection of components of such class is entirely arbitrary, without any good, sound or plausible reason for same.

As to the first and second propositions, which may well be considered together, our insistence is that it is the right of every concern, going and solvent, authorized generally to do business in a State, and it is also the right of one proposing to deal with such concern, to contract, and in the enforcement of such right, to provide for a mortgage on the property of debtor, not subject to any future act or condition of such going concern, and that the right of such concern, legally doing business, to make such preference, cannot be legally prevented.

It is provided in Section 4 of the Act in controversy, that such corporation may acquire and hold real estate, and "may sell and convey such real estate as natural persons may do."

Here the corporation, admitted, on the performance of conditions precedent, has then, being admitted, the same constitutional rights as any natural person—and any fundamental or constitutional right cannot be taken away by any subsequent contingency happening after the admission of said corporation.

It has been decided in Tennessee that private corpora-

tions have the implied power to make mortgages without legislative authority, as is necessary in case of public corporations, such as railroads.

4 Pickle, 152.

We then insist that if the right to grant a preference, on the part of a solvent and going concern, to one of its creditors, is a fundamental right of property, and protected by the Constitution as such, then the right of a creditor to rely on same, cannot be taken away by a statute, under the guise of "terms" under which solvent and going concern shall do business in this State.

As quoted approvingly by the Court in the Blake-McClung case, from the case of Lafayette Insurance Company vs. French, 18 Howard, 404-407, "A corporation created in Indiana can do business in Ohio only with the consent, express or implied, of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law, which secure the jurisdiction and authority of each State from encroachment by all others, or that principal of natural justice which forbids condemnation without opportunity for defense."

Blake vs. McClung, 172 U. S., 255.

In other words, a State may make reasonable regulations, but not by so doing deprive citizens or property owners of constitutional rights which they have as solvent owners of such property.

Is the right to make a preference to one creditor by mort-

gage, on the part of a solvent debtor, a constitutional right? The preference in this case was made by mortgage to plaintiff in error, by defendant Carnegie Land Company while a solvent and going concern, as is admitted. "The power of alienation of property is a necessity incident to the right of property, and was dictated by natural convenience and natural wants."

2 Kent's Com., 326,
Cooley's Con. Lim. (4th ed.), top page 493, Note 1, (6th ed.), 490.

"In America, the right to acquire, to hold, to enjoy, to alien, to devise, and to transmit property by inheritance to our descendants in regular order and succession is enjoyed to the fullness and perfection of absolute right."

2 Kent's Com., pp. 327-328.

These quotations are approved in an able Tennessee opinion by Ed Baxter, Special Judge, in which it was decided that a statute preventing the transmission of property by a person non compos mentis, to his own descendants was unconstitutional, as not being due process of law or the law of the land.

The Stratton claimants vs. Morris claimants, 5 Pickle, 499.

It was also decided in a Tennessee case, in an opinion delivered by Chief Justice Snodgrass, that every solvent debtor had the constitutional right to dispose of his property in whole or in part, in good faith for the payment of his debts, and that meant the right to prefer.

13 Pickle, 610.

The court in the above case further says: "It is, and correctly, insisted that while this Act does not deprive him ab-

solutely of his property, it takes away from him that element of its value which consists in the right to use and legitimately dispose of it, and here it must not be forgotten that we are not dealing with the question of an insolvent debtor conveying its property or any part of it, or of a solvent debtor conveying his property, or any part of it, for the purpose of hindering, delaying or defrauding creditors."

Id., 610-611.

And, further: "To take from property its chief element of value, and to deny to the citizen the right to use and transfer it, in any proper and legitimate method, is as much depriving him of his property, as if the property itself were taken."

Id., p. 611.

The Divine Grocery Company, whose rights were involved in the above case, was a corporation.

The Act set aside in the above cause was "An Act to secure to creditors a pro rata distribution of the property, estates, and assets of debtors and to prevent debtors from making preferences among creditors by assignments, deeds of trust, mortgages, deeds, sales, pledges, or by any form of transfer or conveyance, or by confession of judgment," etc.

In-as-much as the Act in question prohibited a solvent debtor from making preferences in disposing of his property, it was held void.

The only ground manifestly upon which the Tennessee Supreme Court upheld the law in controversy in this case at bar, was that any conditions could be imposed upon the foreign corporation seeking admission into this State, because the same Act that violates the Tennessee Constitution as to the "law of the land," also violates the Fourteenth

Amendment to the Constitution of the United States as to "due process of law."

The general rule is thus stated by Mr. Cooley, "But there is no rule or principle known to our system, under which private property can be taken from one person and transferred to another for the private use and benefit of such other person, whether by general law or special enactment."

Cooley's Con. Lim., (6th ed.) p. 435.
***See also*, 127 U. S., 678-684;**
165 U. S., 590.

It will be noted, that in this case if the said Act is valid, the last estate of the mortgagor is worse than the first, after insolvency, over which he has no control.

Always, except under this statute, as shown by this court in case of Blake vs. McClung, 172 U. S., 254, in case of insolvency, all creditors who had not valid liens fixed, prior to insolvency, shared equally in distribution of assets after insolvency, but here, as never before, on insolvency, the mortgagee has not priority, as he has had up to that time, and has not equality, but goes from first to last—from having a first security, a property right of much value, he has no security in effect, and then takes his place at the foot of all, his property and security, under guise of law, sacrificed for the sole benefit of others. But it is said that he contracted with notice, and has no equity.

If the law be unconstitutional, notice of it is of no effect; but it is notice that does not notify. The Tennessee debts, contracted before the registration of the mortgage, are unknown in number and amount. They are not required to be registered. The debtor seeking additional credit on the faith of a mortgage, is not to be relied on to set out his indebted-

ness. It would simply be a leap in the dark. The mortgagee has no means of knowledge of the debts, and the insolvency which marks the end of his priority is beyond his control.

But it is said that this is analogous to lien laws and deposits of securities for certain creditors by Insurance Companies, which have been upheld. We submit, the cases are not at all analogous.

Liens, mechanic and otherwise, grow out of the work done or material actually furnished to which they attach. They are not floating equities as are the claims of Tennessee creditors in this case. They are not determined by future events, but go in with the property, and the acquisition of the property marks the beginning and the extent of the lien; but, in case of Tennessee creditors, their debts often have no relation to the property subsequently mortgaged.

The application of deposits in the State Treasury to the benefit of home creditors, in case of Life Insurance Companies, furnishes a further argument for our contention that a trust fund is applicable to the purpose for which it is designated and set apart, at a time when the Company setting it apart is solvent.

CLASS LEGISLATION.

We next insist that Section 5 of the Act of 1877, chapter 31, is not due process of law, because it is arbitrary classification of the most obvious character.

As has been said by distinguished authority, "If the Legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to

build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of Legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. 'To forbid to an individual, or a class, the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of liberty, in particulars of primary importance to their 'pursuit of happiness,' and those who should claim a right to do so, ought to be able to show a specified authority therefor, instead of calling upon others to show how and when the authority is negatived."

Cooley Con. Lim., p. 484. (6th ed.)

This applies with exactness to the present case when only foreign corporations engaged in manufacturing and mining, the introduction of whose capital into the State the Legislature desired to facilitate, are shorn of a right granted to all other foreign corporations, domestic corporations and all natural persons, under the Constitution, laws, and decisions of Tennessee.

What reason can be given for the selection of this class, which is to be deprived of its right to contract, as others, and whose mortgage and judgment creditors, citizens of other States, shall lose the lien of their mortgages and judgments in favor of simple contract Tennessee creditors, first contracted, when, if there be a purpose, it would equally apply to all persons and corporations like situated?

As well stated by the Tennessee Supreme Court in the case of the Stratton Claimants vs. Morris Claimants, 5 Pickle, 535, "If the classification is made * * * * for the pur-

pose of subjecting a class to the burden of some special disability, duty or obligation, there must be some good and valid reason why that particular class should alone be subjected to the burden."

In other words, the selection must be a natural, not an arbitrary selection. These principles seem so well settled that there would seem to be no question but that the Act in question is class legislation, and, for that reason, not due process of law, under the holdings of this court.

129 U. S., 626; 118 U. S., 356-359; 165 U. S., 159; 139 U. S., 462-468.

In the last named case, this court, speaking through Justice Brewer, said: "In all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification." "No State can deprive particular persons, or classes of persons, of equal and impartial justice under the law. Due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

As stated further by the Supreme Court of Kansas, following 139 U. S., 462-468, "A classification of the kind attempted makes a distinction between corporations identically alike in organization, capital, and all other powers and privileges conferred by law. It is arbitrary and wanting in reason. The act in question is class legislation of the most pronounced character."

State vs. Haun, decided Dec. 9, 1899, and reported in Advance sheets, Part 5, vol. 11, Am. & Eng. Corp. Cases, (N. S.)

We insist that the Supreme Court of Tennessee predicated its decree adverse to plaintiff in error, not upon the ground that the rights here claimed are not constitutional rights of every citizen of the Union, with respect to property, but upon the dictum in the case of Fritts vs. Palmer, 132 U. S., 282, and on the general statement of the doctrine announced in the case of Pembina Con. Silver Mining and Milling Co. vs. Pennsylvania, 125 U. S., 181, that, "The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits * * * * arises where the corporation is in the employ of the Federal Government, or where its business is strictly commerce, interstate or foreign."

And, we insist, on the contrary, that such legislation cannot admit such foreign corporations, on the performance of certain conditions precedent, and at the same time deprive such corperations and their creditors of rights of property secured to them by the Constitution of the United States in the Fourteenth Amendment, such rights as has every solvent creditor, by the law of the land. If this be not a proper limitation of the right of the State, they may admit with one hand and deny every substantial right with the other. In such an event, a foreign corporation, on entering a State under such a law, passes beyond the protection of the Fourteenth Amendment. Right of removal of causes to Federal courts in proper case is no more, we insist, a constitutional right, beyond the right of a State to impair by such legislation (170 U. S., 194), than is the right of corporations, when solvent, to dispose of their property, as all other persons and corporations are permitted to do.

In conclusion, we insist that plaintiff in error is entitled, under his second mortgage, to the fund realized from the

sale of the hotel property, as well as the proceeds of the property on which plaintiff in error has the first mortgage, for the reason that the Travelers Insurance Company did not, in the Supreme Court of Tennessee, "specially set up and claim" that the Act in controversy violated Section 1 of the Fourteenth Amendment to the Constitution of the United States, and cannot now set up the same, unless the raising and claiming of same by plaintiff in error would inure to the benefit of said Travelers Insurance Company.

See Assignment of Travelers Ins. Co. in Supt. Ct. of Tenn., tr. 89 et seq.

For all the above reasons, the Supreme Court of Tennessee should be reversed, and decree rendered for plaintiffs in error.

Shields Bros., one of the Tennessee creditors in the original bill below, has conceded the contention of plaintiffs in error, since the decision of Blake vs. McClung, supra, and now makes such concession.

R. E. L. MOUNTCASTLE,
For Plaintiffs in Error.

QUINCY WARD BOESE,
SHIELDS & MOUNTCASTLE,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

UPON WRITS OF ERROR TO THE SUPREME COURT OF TENNESSEE.

WILBERFORCE SULLY ET AL.
vs.
AMERICAN NATIONAL BANK ET AL.

WHEREAS, in the original stipulations of counsel as to record to be printed, pages 142-147 of printed record in the Supreme Court of the United States in the above cause, and under stipulation sixteenth thereof, on page 146, occurs this stipulation:

"16th. The assignments of error filed in the Supreme Court of Tennessee. Tr., vol. 6, pages 2025-2038 and 2052-2078." And,

WHEREAS, It was intended by this stipulation to have printed especially, the assignments of error of appellants filed in the Supreme Court of Tennessee from the decree and judgment of that court to the Supreme Court of the United States; and,

WHEREAS, The paging under said stipulation sixteenth calls for only the assignments of error filed in the Supreme Court of Tennessee from the decree of the Court of Chancery Appeals of Tennessee, instead of the assignments of error above set out, by mistake of counsel.

THEREFORE, In order that the matter may be corrected without additional expense in the printing of record, it is hereby agreed on the part of counsel representing parties in the above cause that the assignments of error filed by ap-

pellants on January 20, 1899, and found at pages 2110-2116, 2118-2120, and 2121-2126 of volume 6 of the record in the above cause, now filed in the Supreme Court of the United States, may be printed in the briefs of counsel as provided by Rule 21 of the Supreme Court of the United States, together with this stipulation, and, when so printed, will be taken as a part of the record in the cause, and in full compliance with Rule 21 of the Supreme Court of the United States.

E. C. REEVES, Sol. for Creditors,
S. C. WILLIAMS, Sol.
ROBT. BURROW.
ISAAC HARR, Sol. for K.
DEADERICK & EPPS,
Sol. for Am. Natl. Bank et al
E. J. BAXTER, Sol.
SAMUEL M. ARNELL, Sol.
THAD. A. COX, Sol.
KIRKPATRICK, WILLIAMS & BOWMAN,
By Jno. H. Bowman, member of firm.
HENRY HUDSON.
WEBB & McCLUNG,
H. H. CARR,
For Travelers Insurance Co.
SHIELDS & MOUNTCASTLE,
For Carhart, Myton, Sully, and others.

No. 266.
Reply Brf. of Mountcastle for
Office Supreme Court
FILED
APR 25 1900
JAMES H. McKENNEY,
Clerk
Filed April 25, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 266.

WILBERFORCE SULLY, TRUSTEE, ET AL., PLAINTIFFS IN ERROR,

vs.

THE AMERICAN NATIONAL BANK ET AL.

REPLY BRIEF OF PLAINTIFFS IN ERROR, WILBERFORCE SULLY, MRS. MARY P. MYTON, AND ALFRED B. CARHART.

R. E. L. MOUNTCASTLE,
Attorney for Plaintiffs in Error.

QUINCY WARD BOESE,
SHIELDS & MOUNTCASTLE,
Of Counsel.

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